FILED
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

MARVIN LOVE, PETITIONER

v.

DEPARTMENT OF JUSTICE, RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MARVIN LOVE
7 PICAYUNE CT.
LITTLE ROCK, AR 72211
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PRO SE

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER IT WAS ERROR FOR THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT TO FIND THAT THE PETITIONER FAILED TO REPORT THE DISCHARGE ATF ISSUED FIREARM.

II.

WHETHER THE UNITED STATES COURT OF APPEALS IN AFFIRMING THE MERIT SYSTEMS PROTECTION BOARD'S DECISION ERRORED IN FINDING THAT PETITIONER ENGAGED IN THE WILLFUL USE OF A GOVERNMENT FURNISHED AUTOMOBILE FOR OTHER THAN OFFICIAL PURPOSES.

PARTIES

The parties to this proceeding are Marvin Love, Petitioner and Department of Justice, Respondent.

Mr. Love currently resides 7 Picayune Ct.., Little Rock, Arkansas, 72211.

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FEDERAL STATUTES

5 U.S.C. § 7703 ©)

In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--
(3) unsupported by substantial evidence.

ATF ORDERS

ORDER 8200.3 A (3) (a)

It is the responsibility of every Bureau employee to demonstrate good judgment during and after any incident in which a firearm has been discharged. As appropriate, special agents involved in a shooting incident shall: (3) notify local law enforcement authorities of incidents involving property damage, injury, and/or death.

ORDER 2130.1 (8)(a)

An employee who willfully uses or authorizes the use of a government furnished automobile for other than official purposes will be suspended. "Willful use for other than official purposes" is defined as voluntary or consciously using a government furnished automobile with knowledge of, or with reckless disregard for, the fact that the use is for other than official purposes.

ORDER 2735.1

Employees are prohibited from using Government cars for other than official purposes.

CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

MARVIN LOVE PETITIONER

V.

DEPARTMENT OF JUSTICE RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FEDERAL CIRCUIT

Marvin Love, petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit Court of Appeals opinion is reported in *Love v. Department of Justice,* 06-3071, June 7, 2006. The opinion of the Court is attached in Appendix B. The opinion of the Merit System Protection board is attached as Appendix C.

JURISDICTIONAL STATEMENT

Petitioner asserts that this Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. § 1254 (1). The opinion of the Appeals Court was filed June 7, 2006. The jurisdiction was based on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

There are no constitutional questions in this case.

STATEMENT OF THE CASE

The appellant was employed as a criminal investigator with the Bureau of Alcohol, Tobacco, Firearms and Explosives. ("ATF"). The appellant's post of duty was the Little Rock Field Office, New Orleans Field Division. During the relevant time period, the Appellant owned vacant rental property at 6 Old Glory Court in Little Rock, Arkansas. This property had been vandalized and the appellant was seeking a tenant to fill the vacancy. On the morning of February 11, 2004, the Appellant received a telephone call from a prospective tenant responding to an advertisement for the property. The prospective tenant identified herself as Cynthia Ellis. Ms. Ellis spoke with the appellant about the rental property and stated that she could possibly view the property around noon that same day, although nothing was etched in the stone. The appellant, at end of this conversation, was left with the impression that there would be follow up discussion to confirm a more precise meeting time. No further discussion took place between the appellant and his prospective tenant before the appellant left for lunch.

On February 11, 2004, the appellant drove his Government Furnished Automobile ("GFA") to a restaurant in order to have lunch. He left the office around noon and decided to stop at his rental property at 6 Old Glory Court, which is located proximally to Ryan's restaurant. The appellants' reasons for stopping are disputed. The appellant states that he stopped to inspect the property to assess what work he would need to do to prepare the property to show it to the tenant. The agency claims that the appellant went to the property in order to meet with his prospective tenant with whom he had agreed to meet after noon.

At approximately 12:00 pm. the appellant arrived at 6 Old Glory Court and entered the residence there. Upon entering the residence, the appellant heard a noise in another section of the duplex, which led him to believe that unauthorized individual was present in the property. The appellant then drew his service issued weapon and proceeded toward the location of the noise. There, he observed an intruder leaving the building through a window in the back bedroom. As the appellant approached the window, he was startled by a noise behind him and accidentally discharged his firearm. The weapon fired through the window.

The appellant proceeded to the nearby police Neighborhood Alert Center ("NAC"). There he reported the break in and the presence of the intruder, and indicated that there may be additional intruders on the property. There were no police officers at the station at that time, and the appellant was advised to return to his property as the officers were dispatched there. Little Rock Police Officer (LRPD) Deborah Allen was contacted by the NAC and asked to proceed to 6 Old Glory Court. While the appellant was waiting for Officer Allen to arrive, MS. Ellis arrived at the residence.

The appellant showed Ms. Ellis the duplex and arranged to meet with her at 1:00 p.m. at a Wendy's restaurant near his office. The meeting at Wendy's was set in order to give her a renal application, which he had not brought with him, but left at his office along with everything else with which to conduct business, personal or otherwise. Ms. Ellis left. The appellant was at the residence when the police arrived. The appellant accompanied the police as they searched the building.

Having dealt with Officer Allen before, the appellant did not inform the officers that he was a Federal Law Enforcement Officer, or that he had discharged his weapon. Officer Allen discovered a young male hidden in the bedroom closet. The appellant drew his weapon during he apprehension of this male juvenile, who was identified as Eric Summers, a local youth. The juvenile was taken into custody. The appellant then left the property and proceeded back toward the office. As the juvenile was being processed he revealed to the officers that he saw the appellant and a lady walking in the house, and heard the male voice say "I hope I got the bastard." The juvenile also reported hearing a gunshot.

On his way back to the office, at approximately 1:10 p.m. the appellant stopped at the Wendy's where he had discussed meeting the prospective tenant. Ms. Ellis was not present, so the appellant returned to his office. There he joined SA Richard Coes, and departed with SA Coes to serve subpoenas in Pine Bluff, Arkansas. The appellant received a telephone call from Officer Allen on his personal cell phone as he was driving to Pine Bluff with Special Agent Coes. During this phone conversation, Officer Allen asked the appellant "what happened in the apartment before I arrived." The appellant asked the officer to ask specifically what she wanted to know. Officer Allen asked the appellant if he had fired his weapon in the apartment prior to the arrival to the police. The appellant responded in the affirmative. Officer Allen instructed the appellant to return to the NAC to discuss the incident further. SA Coes dropped the appellant off at his personal vehicle and proceeded to Pine Bluff to serve subpoenas. The appellant returned to the NAC, and was informed that he would need to make a statement to the LRPD at their detective division. The appellant returned to his place of work to draft a statement to submit to the detectives.

Around 4:15 p.m. that day, as the appellant was walking to his car to deliver his statement to the LRPD Detectives he informed Resident Agent in Charge (RAC) Jeff Brzozowski that he had something to tell him. The appellant then informed RAC Brzozowski that he had discharged the firearm. The purpose in informing the RAC was to explain the disruption in his schedule, as he had not gone to Pine Bluff to serve subpoenas with SA Coes as scheduled. RAC Brzozowski informed the appellant that such a discharge must be reported. The appellant disagreed, and RAC Brzozowski brought him back to his office to review the regulations and standing orders regarding the accidental discharge of a firearm. Subsequently, the discharge was reported up the chain of command to Assistant Special Agent in Charge (SAC) Robert Browning in New Orleans and a Significant Activity Report (SAR) was drafted, along with a memorandum, which also served as the narrative portion of the SAR. The purpose of the SAR was to explain the discharge of the firearm and the memorandum was limited to discussion of that event. The memorandum was sent the following morning, and was dated February 12, 2004.

The Agency Office of Inspection conducted an investigation in response to the SAR, during which they investigated the entirety of the appellant's actions on that day. On February 19, 2004, the appellant was interviewed by the Office of Inspection. Based on this interview and their findings, the Office of Inspection issued a report of Investigation (ROI) on April 21, 2004. On September 1, 2004, the Professional Review Board proposed the appellant's removal on four reasons: (1) Inappropriate Handling of your ATF-Issued Firearm; (2) Failure to Report the Discharge of your ATF-Issued Firearm; (3) Willful Use of Government Furnished automobile (GFA) for Other Than Official Purposes; and

(4) Lack of Candor. The appellant presented a written reply to Bureau Deciding Official (BDO) Kenneth Massey on October 28, 2004 and an oral reply on October 29, 2004. BDO Massey, in his final decision, overturned reason 1, sustaining reasons 2, 3, and 4. Reasons 2, 3, and 4 were considered as factors in the appellant's removal.

The Appellant appealed his removal to the Merit System Protection Board. After a hearing, an administrative judge upheld the second and third charges but rejected the fourth charge as unsupported by the evidence and sustained the penalty of removal.

The Appellant appealed his removal to the Court of Appeals for the Federal Circuit. The decision to remove the appellant was affirmed.

REASONS FOR GRANTING THE WRIT

1.

WHETHER IT WAS ERROR FOR THE UNITED STATES COURT O ' APPEALS FOR THE FEDERAL CIRCUIT TO FIND THAT THE PETITIONER FAILED TO REPORT THE DISCHARGE ATF ISSUED FIREARM.

Mr. Love was not required to report the accidental discharge of the firearm to the local authorities under the applicable reporting guidelines. ATF Order 8200.3A requires an agent to report unintentional discharges to local authorities for safety reasons, if appropriate. Both the ALJ and the Federal Appellate Court totally disregarded clear evidence as to where the discharged bullet actually went and erroneously concluded that public safety was at issue.

Mr. Love, who is thoroughly familiar with the surroundings in which the discharge took place, knew that the gun was aimed out of the window and toward the ground when he discharged it. There is no evidence and no reason to believe that the bullet ended up anywhere other than the soil. The best available evidence demonstrates unequivocally that the bullet went into the ground near the base of a tree in the back yard of the residence. In fact, Mr. Love's supervisor found the fresh scrape mark on that very tree, although no effort was expended to find the actual bullet in the ground under the heavy brush.

The fact that Mr. Love brought the incident to the attention of his supervisor and the conversation that ensued evidences Mr. Love's good faith belief that he had the discretion to determine whether or not a report to the local police was necessary.

Such discretion, based upon good judgment, is afforded agents in Mr. Love's position pursuant to ATF Manual Order 8200.3A, which states: "unintentional discharges will also be reported to the local authorities for public safety reasons, *if appropriate*." The good judgment determination here is based upon the earlier cited manual order: "Local law enforcement authorities should also be notified if the incident involves property damage, injury, or death." Property damage, injury, or death was not at issue in the instant case. Therefore, the finding that Mr. Love failed to report the discharge of an ATF issued firearm is clearly erroneous. Mr. Love had no obligation to make such a report.

2.

WHETHER THE UNITED STATES COURT OF APPEALS IN AFFIRMING THE MERIT SYSTEMS PROTECTION BOARD'S DECISION ERRORED IN FINDING THAT PETITIONER ENGAGED IN THE WILLFUL USE OF A GOVERNMENT FURNISHED AUTOMOBILE FOR OTHER THAN OFFICIAL PURPOSES.

In order to sustain a violation of the ATF vehicle misuse policy
by Mr. Love, two things must be shown: (i) that Mr. Love acted with knowledge that the intended use of the vehicle would be characterized as "misuse"; or (ii) that Mr. Love acted with reckless disregard for whether the intended use was unofficial. ATF Order 2130.1 Section 8a. Neither element has been demonstrated in the instant case. The Federal Appellate Court improperly sustained that charge, contrary to prevailing case law, based on inference rather than direct evidence, as intent cannot be inferred.

Also, a statement provided by the prospective tenant, Cynthia Ellis, was completely ignored.

The Federal Appellate Court notes that, "Mr. Love's removal hinges on whether his trip to the house in the government vehicle was incidental to his lunch trip, which permissible use of a government vehicle, or whether the trip in the government vehicle was for a purely personal use." There is no evidence that Mr. Love stopped at the apartment for any reason other that to inspect the property. If indeed, as the Federal Appellate Court noted, a trip to the house incidental to a lunch trip is permissible use of the government vehicle, then misuse cannot be sustained. The evidence that the Federal Appellate Court found "circumstantial evidence that is, at best, marginally relevant, and of his own testimony" is the only evidence that exists. The evidence offered by the government is Mr. Love's statement, in which he reported that he had an early morning conversation with a prospective tenant and the fact that he and the prospective tenant were at the house at the same time. Mr. Love explains that based on the conversation with the prospective tenant, he expected a confirmatory telephone call, which never occurred.

Mr. Love made clear in his testimony that: (i) he was going to lunch at Ryan's restaurant; (ii) it was lunchtime; (iii) the restaurant where Mr. Love planned to dine is within the prescribed limits; (iv) he had an appointment with Special Agent Coes after lunch; and finally, (v) Mr. Love has no business papers in his possession (Indeed in the original agency file, the prospective tenant provided a statement that she did not have an appointment with Mr. Love.).

As no evidence to the contrary has been offered, the willful misuse charge cannot properly be sustained. The ALJ and the Federal Appellate Court in essence improperly shifted the burden of proof from the ATF to Mr. Love. The evidence does not demonstrate that more likely than not that: (i) Mr. Love knew the use was unauthorized; or (ii) that he used the vehicle with reckless disregard of whether such use was authorized.

Intent cannot be inferred. There exists no evidence of Mr. Love's state of mind. *See Naekel v. Dept. of Transp.*, 782 F2d 975, 978 (Fed. Cir.1986.) and 62 M.S.P.R. 502 Docket DE-0752-92-0397—1.

In addition to the foregoing, in order for misuse to be sustained, the misuse must be willful, as minor personal use is authorized. Minor personal use is a brief stop of 15 minutes or less incidental to other official travel...on the direct route between duty assignment, while at a meal break or between the duty assignment and the employees residence if home to work use has been authorized. Stopping at a disco after dinner while on official government business does not constitute willful misuse of a government-owned vehicle. *See D'elia v. Dept. of Treasury,* 14 MSPR 54 (1982). Two stops at the dentist's office, where such office was on the employee's business route, have been considered minor misuse. *See Lynch v. Dept. of Justice,* 32 MSPR 33 (1986). A supervisor's authorization of a typist to drive a government- owned vehicle to secure her own vehicle that had broken down on the way to work was found proper. The court found that Felton acted in good faith in attempting to solve an office emergency and that, under the circumstances, the exercise of management judgment, even assuming that it was poor judgment, did not rise to the level of reckless disregard. *See Felton v EEOC,* 820 F.2d 391, 392 (1987).

Mr. Love on the other hand, planned or unplanned, before lunch or after lunch, met a prospective tenant at his rental property. The property is within the legal limits of time and distance relative to the office and a regular lunch spot and as in *Lynch*, on the same business route. The meeting occurred during the lunch hour at a time when Mr. Love did not have pencil, paper or any other item associated with conducting personal business and meeting the tenant took less that five minutes. Yet this meeting is considered misuse of a government vehicle. The ALJ and the Federal Appellate Court each said that the meeting at the apartment was for purely personal reasons. Clearly, however, the stop at the rental property was for no more "purely personal purposes" than the stop at the disco by *D'elia* was for purely personal purposes or the stops at the dentist by *Lynch* were for purely personal purposes and either could reasonably take longer than 15 minutes.

Admittedly, the actual stop at the rental unit did not benefit anyone except Mr. Love. However, the stop was incident to official business, as lunch falls into that category and the instant case is materially identical to *D'elia* and *Lynch*. But for the principal intervening event Mr. Love would not have seen the prospective tenant, enjoyed a healthful lunch and returned to work. The doctrine of incidental activities is nothing new to ATF.

The basis for Mr. Love's termination was a charge of lack of candor. The lack of candor charge was not sustained, yet the decision to remove was upheld. The lack of candor charge, the most serious charge, was predicated on "your statement concerning the events that led up to the accidental discharge of your firearm at your rental property and the affidavit given to OI on February 19, 2004, contain different accounts of why you were in the vicinity of your rental property."

The government's assertion is that Mr. Love went to the apartment specifically to meet the prospective tenant, when he said in his statement that he was going to lunch. As the ALJ ruled, Mr. Love did not lack candor in the statements; Mr. Love was indeed going to lunch and not expressly meeting the tenant; therefore, the lack of candor charge was not sustained. That being the case, the misuse of the government vehicle cannot be sustained because one charge is the basis for the other. Mr. Love was going to Ryan's restaurant for lunch, which is within the parameters for the use of the government-owned vehicle, as lunch is considered official business. A deviation of eight-tenths of one mile, for a myriad reasons, cannot be considered willful misuse, because, as previously demonstrated minor personal use is authorized.

The government relies on the fact that Mr. Love was disciplined in 1992 for misuse of a government-owned vehicle as an aggravating factor in the disciplinary phase of this investigation. "It is also noteworthy that the appellant has been reprimanded for improper use of a GFA and lack of candor in 1992". The government further intimates erroneously- that the allegation today is the same as in 1992, in spite of the fact that the lack candor allegation in the instant case was not sustained.

In 1992, Mr. Love was disciplined under ATF Order 2735.1 dated May 31, 1974. That particular regulation read "employees are prohibited from using government cars for other than official purposes." The current allegation is relative to ATF Order 2130.1, dated March 29, 2000. The regulation now allows for minor personal use. Although the violation goes by the same name, certain conduct is allowed under one order but not under the other.

In the interest of justice, this matter should, at a minimum, be remanded for reconsideration of an alternate disciplinary action short of discharge. A full one-half the original charges—including the most serious charge upon which the removal was based—have been invalidated.

Abundant prevailing authorities counsel that the punishment should fit the crime in such matters. "When we have invalidated most of the charges against the employee or the invalidated charges are the most serious charges, we have vacated the penalty and remanded for reconsideration of the penalty in light of the significant change in the number and seriousness of the sustained charges". *See Guise v Dept. of Justice,* 330F.3d 1376, 1382 (Fed. Cir. 2003); *Grafton v Dept. of Treasury,* 864 F.2d 140,144 (Fed. Cir.1988); *Southers v Veteran Admin.,* 813 F.2d 1223, 12226 (Fed. Cir. 1887).

The invalidation of the charge of lack of candor significantly changes the analysis of the Douglas Factors. Fully one-half of the twelve Douglass factor explanations must change in light of the invalidation of the lack of candor charge. All relevant considerations, both mitigating and aggravating, must be considered in order to determine what, if any, disciplinary action is appropriate and warranted. Such a clear-headed, balanced analysis did not occur in the instant case.

Douglass Factor 1, as explained by the agency says "his value and usefulness as a special agent is significantly diminished if he can't testify in court, which potentially may result if the allegation regarding the lack of candor is sustained."

Douglass Factor 1, as explained by the agency says "most of the violations were not repeated or committed maliciously, but by his own admission, violation 3 was repeated." Violation 3 refers to the unofficial use of the government-owned automobile.

At the time of deposition, the agency vacated each specification of that violation with the exception of the February 11, 2004, incident which invalidated said explanation.

Douglass Factor 5, as explained by the agency says "repeating the same violations…Additionally, if the lack of candor violation is sustained it will negatively impact his ability to testify in court."

Petitioner respectfully requests that this matter be reversed and remanded for proper consideration of the Douglas Factors in light of the invalidated and sustained charges. Moreover, Petitioner respectfully requests that alternative disciplinary action short of termination be imposed.

Mr. Love is a 45 year old husband and father of three. He has 20 years of loyal government service, 17 of which is with the Bureau of ATF. At the time of his removal, he was only three years from having full retirement eligibility. Age, marital status, or years of service should have no bearing on punishment, if merited. However, an employee, especially one with such a lengthy career, should be afforded the benefit of the doubt in instances where no proof exists, not even proof by a preponderance of the evidence.

At the time of the Internal Affairs interview of Mr. Love he had no knowledge of the full name or contact information of the prospective tenant. He only had the information that was provided to the Internal Affairs Investigator – the first name of the young lady; her student status at Philander Smith College and his belief that she was a nurse, as she was dressed in scrubs. At the insistence of his attorney of record at the time, Mr. Love found the young lady by going to Philander Smith College, a Historically Black College with an enrollment of less than 800, and simply asked passersby until someone knew whom he was trying to locate.

Mr. Love passed on the contact information to his attorney who interviewed the young lady and included her statement and contact information in the initial appeal. The Agency never thought it important enough to interview the only person, other than the appellant, who could testify as to whether the stop at the apartment was based on an appointment or incidental to official business. Failure to interview such an important witness severely undermines and taints the agency investigation; shows lack of an effort to discover whether the appellant did in fact violate the statute and is a clear abuse of discretion, all of which is contrary to the seven tests of "just cause" as delineated in the Daugherty Decision of conduct and discipline.

CONCLUSION

For the reasons set forth above petitioner asks that the court issue writ of certiorari to the United States Court of Appeals for the Federal Circuit and reverse the decision of the Federal Circuit in this matter and remand the case to the Agency for alternative disciplinary action short of termination.

Respectfully submitted,

_____

MARVIN LOVE
7 Picayune Ct.
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(501) 680-0712

Pro Se

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DEPARTMENT OF JUSTICE, RESPONDENT

PETITION FOR WRIT OF CERTIORARI
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

06-3071

MARVIN LOVE,

Petitioner,

V.

DEPARTMENT OF JUSTICE

Respondent.

ORDER

NOTE: Pursuant t Fed. Cir. R. 47.6, this order is not citable as precedent.
It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

Before Michel, Chief Judge, Plager, Senior Judge, and Bryson, Circuit Judge.

A petition for rehearing having been filed by the Petitioner,

Upon Consideration thereof, it is

Ordered that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on July 31, 2006

FOR THE COURT,

"s/ Jan Horbaly
Clerk

Dated: 07/05/2006

Cc: Marvin Love
James W. Poirier
LOVE V JUSTICE, 2006-3071
(MSPB – DA0752050205-I-1)

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APPENDIX B

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

06-3071

MARVIN LOVE,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

DECIDED: June 7, 2006

Before MICHEL, Chief Judge, PLAGER, Senior Circuit Judge, and BRYSON, Circuit Judge.

PER CURIAM.

DECISION

Marvin Love appeals from a decision of the Merit Systems Protection Board, Docket No. DA-0752-05-0205-I-1, affirming a decision by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") to remove him from his position as a criminal investigator with the agency. We affirm.

BACKGROUND

Until his removal on December 22, 2004, Mr. Love was a criminal investigator at the ATF field office in Little Rock, Arkansas. His removal stemmed from an incident that occurred on February 11, 2004, at a rental house Mr. Love owned in Little Rock. While Mr. Love was on duty at the ATF office on that day, he spoke on the telephone with a prospective tenant about renting his house. At about noon, Mr. Love left the ATF office in a government vehicle and drove to his rental house.

Mr. Love contends that he had set out to drive to a restaurant for lunch, and had merely taken a short detour to stop by his rental house to see whether it needed any work before showing it to prospective renters. The administrative judge found, however, that Mr. Love had planned to meet the prospective tenant at the house. That detail is relevant to this appeal because one of the charges that led to Mr. Love's removal hinges on whether his trip to the house in the government vehicle was incidental to his lunch trip—which is a permissible use of a government vehicle—or whether the trip in the government vehicle was for a purely personal purpose.

Mr. Love never made it to the restaurant that day, because when he arrived at his rental house he discovered an intruder inside. Mr. Love drew his service weapon and the intruder fled through a window. According to Mr. Love's account, a noise startled him as he watched the intruder flee, and he accidentally fired his weapon out the window. Shortly thereafter, Mr. Love reported the break-in to the police, who dispatched an officer to the house. While Mr. Love was waiting for the officer, the prospective tenant with whom he had spoken earlier that day arrived at the house. Mr. Love showed her the house, and they agreed to meet later in the day so that Mr. Love could give her a rental application. Shortly after the prospective tenant left the house, the dispatched police officer—Officer Deborah Allen—arrived at the house. Mr. Love and the officer searched the house and discovered a second intruder hiding in a closet.

The officer took that intruder into custody and Mr. Love headed back to the ATF field office. Mr. Love never mentioned to Officer Allen that he had drawn his weapon or that his weapon had discharged.

On his way back to the ATF field office, Mr. Love stopped to meet the prospective tenant as they had agreed, but she was not at the planned meeting place. Mr. Love then returned to his office, where he and Special Agent Richard Coes undertook to deliver copies of subpoenas to a nearby town. While they were driving, Mr. Love received a call from Officer Allen, who had learned during her interrogation of the second intruder that Mr. Love had drawn and fired a weapon. During that call, Mr. Love admitted to having done so, and Officer Allen asked him to come to the police station to discuss the incident. Special Agent Coes then dropped Mr. Love off at his personal vehicle and Mr. Love went to the police station. Mr. Love returned to the ATF field office later that afternoon. While walking to his car at about 4 o'clock that afternoon, he told his superior, Jeff Brzozowski, about the incident. Mr. Love testified that the reason he told Brzozowski about the incident was to explain why he was not delivering subpoenas with Special Agent Coes. When he told Brzozowski about the discharge of his weapon, the two disagreed about whether ATF regulations required Mr. Love to report the incident. Ultimately, the incident was reported to Mr. Love's supervisors and ATF conducted an investigation into the matter. Following that investigation, ATF proposed Mr. Love's removal based on four charges:
(1) mishandling a service weapon; (2) failure to report a discharge of a service weapon; (3) use of a government vehicle for a non-official purpose; and (4) lack of candor.

In response to Mr. Love's response to the notice of proposed removal, ATF dropped the first charge, but sustained the other three and effected Mr. Love's removal. Mr. Love appealed his removal to the Merit Systems Protection Board. After a hearing, an administrative judge upheld the second and third charges but rejected the fourth charge as unsupported by the evidence.

With respect to the second charge, the administrative judge concluded that ATF regulations required Mr. Love to report the accidental discharge of his weapon to his supervisors immediately after it occurred, and also to report the discharge to the local police. The administrative judge found that Mr. Love failed on both of those accounts because he delayed reporting the discharge to his supervisors and he reported the discharge to the police only after the police learned about the discharge from the second intruder and confronted Mr. Love about the matter. With respect to the third charge, the administrative judge concluded that Mr. Love's use of a government vehicle on February 11, 2004, was for purely personal purposes, and therefore was in violation of ATF regulations. Because Mr. Love had been disciplined for misuse of a government vehicle in the past, the administrative judge agreed with ATF that the misuse charge was particularly serious. Mr. Love petitioned for review of the administrative judge's decision, but the petition for review was denied.

DISCUSSION

On appeal, Mr. Love argues that the two charges that were upheld by the Board were not supported by the evidence. We disagree. Mr. Love's evidence in support of his arguments consists of circumstantial evidence that is, at best, marginally relevant, and of his own testimony, which the Board did not find credible.

For instance, Mr. Love argues that the Board erred by concluding that the gun incident implicated public safety; therefore, Mr. Love argues, he was not required by ATF Order 8200.3A(2)(a) to report the incident to the local police.

In support of his assertion that the incident did not implicate public safety, Mr. Love argues that he "knew with reasonable certainty that the gun was pointed in the direction of a tree and toward the ground." The administrative judge did not credit Mr. Love's version of the incident, and we see no grounds on which to disturb the administrative judge's finding in that regard. Similarly, the administrative judge did not credit Mr. Love's explanation for not having immediately reported the firearm discharge incident to his supervisor, or his assertion that stopping at his rental house—and using a government vehicle to drive there—was incidental to an official use of the vehicle. Mr. Love has not shown that the administrative judge's findings were unsupported by substantial evidence, and we therefore sustain those findings. Mr. Love also complains that the penalty of removal was unreasonable in light of the two charges that the Board affirmed. Again, we disagree. Both the agency and the administrative judge provided detailed and thorough analyses of the Douglas factors, see Douglas v. Veterans Admin., 5 M.S.P.R. 280 (1981), and Mr. Love has not pointed to any specific errors in their analysis. Nor does the fact that the administrative judge rejected one of the three charges affect the penalty in this case. There is no indication from the agency that it would have imposed a lesser penalty in the absence of the lack of candor charge, and the Board determined that the penalty was reasonable in light of the two charges that were sustained. See Lachance v. Devall, 178 F.3d 1246, 1259-60 (Fed. Cir. 1999).

In the decision letter, the deciding official stated that all of the charges against Mr. Love were "extremely serious" and that the several charges "raise concerns about your ability to adhere to the standards set by the Bureau for a special agent."

The deciding official added that the fact that Mr. Love was previously suspended for providing untrue statements and misusing a government vehicle "makes these charges even more serious." The administrative judge noted that when the Board sustains fewer than all of the agency's charges, the Board "may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in proceedings before the Board that it desires that a lesser penalty be imposed on fewer charges." Based on the evidence before him and the seriousness of the two sustained charges, the administrative judge concluded that a lesser penalty was not appropriate. Mr. Love has not demonstrated that the administrative judge's conclusions as to the seriousness of the sustained charges and the appropriateness of the penalty are unreasonable. We therefore affirm the Board's decision upholding Mr. Love's removal from his position.

No._____

IN THE SUPREME COURT OF THE UNITED STATES

MARVIN LOVE, PETITIONER

v.

DEPARTMENT OF JUSTICE, RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS

MARVIN LOVE, DOCKET NUMBER

Appellant, DA-0752-05-0205-I-1

v.

DEPARTMENT OF JUSTICE, DATE: July 19, 2005

Agency.

Denis P. McAllister, Esquire, Garden City, New York, for the appellant.

Jill A. Weisman, Esquire, Washington, D.C., for the agency.

Keith L. Williams, Esquire, Washington, D.C., for the agency.

BEFORE
Sidney E. Farcy
Administrative Judge

INITIAL DECISION

On January 25, 2005, Marvin Love filed an appeal from the action of the Department of Justice, Bureau of Alcohol, Tobacco, and firearms & Explosives, which removed him from his position as a criminal investigator, GS-1811-13, effective January 3, 2005. The board has jurisdiction over this matter pursuant to 5 U.S.C. Secs. 7511 (a) (1) (A), 7512(1), and 7701.

At the appellant's request, a hearing was held at Little Rock, Arkansas on May 5, 2005. Having considered the evidence of record, including the testimony at hearing, I find that the agency failed to prove one of its charges, but that it proved the remaining two charges, and that the proven misconduct supports the penalty of removal. Therefore the agency action is AFFIRMED.

ANALYSIS

Factual background.

The appellant was employed as a criminal investigator with the Bureau of Alcohol, Tobacco, Firearms and Explosives. ("ATF"). The appellant's post of duty was the Little Rock Field Office, New Orleans Field Division. During the relevant time period, the Appellant owned rental property at 6 Old Glory Court in Little Rock, Arkansas. This property was vacant, and the appellant was seeking a tenant to fill this vacancy. On the morning of February 11, 2004, the Appellant received a telephone call from a prospective tenant responding to an advertisement for the property. The tenant identified herself as Cynthia Ellis. Ms. Ellis spoke with the appellant about the rental property and reached an understanding to meet at or around noon that same day. Direct Examination of Marvin Love, Tape 2B. The appellant alleges that at the end of this conversation, he was left with the impression that there would be follow up discussion to confirm a more precise meeting time. Id. No further discussion took place between the appellant and his prospective tenant before the appellant left for lunch. Appeal File (AF) Tab 15.

On February 11, 2004, the appellant decided to drive his Government Furnished Automobile ("GFA") to a restaurant called Ryan's in order to have lunch.

He left the office around noon and decided to stop at his property at 6 Old Glory Court, which is located proximally to Ryan's restaurant. The appellants' reasons for stopping are disputed. The appellant claims that he stopped to inspect the property to assess what work he would need to do to prepare the property to show it to the tenant. Id. The agency claims that the appellant went to the property in order to meet with his prospective tenant, with whom he had agreed to meet after noon. AF Tab 16.

At approximately 12:30 p.m. the appellant arrived at 6 Old Glory Court and entered the residence there. Upon entering the residence, the appellant heard a noise in another section of the duplex, which led him to believe that unauthorized individual was present in the property. The appellant then drew his service issued weapon and proceeded toward the location of the noise. There, he observed an intruder leaving the building through a window in the back bedroom. As the appellant approached the window, he was startled by a noise behind him and accidentally discharged his firearm. The weapon fired out through the window. AF Tab 16.

The appellant proceeded to the nearby police Neighborhood Alert Center ("NAC"). There he reported the break in and the presence of the intruder, and indicated that there may be additional intruders on the property. There were no police officers at the station at that time, and the appellant was advised to return to his property as the officers were dispatched there. Little Rock Police Department Officer (LRPD) Deborah Allen was contacted by the NAC and asked to proceed to 6 Old Glory Court. While the appellant was waiting for Officer Allen to arrive, MS. Ellis arrived at the residence. AF Tab 15.

The appellant showed Ms. Ellis the duplex and arranged to meet with her at a Wendy's restaurant near his office in order to give her a renal application, which he had not brought with him. Ms. Ellis left. The appellant was at the residence when the police arrived. The appellant accompanied the police as they searched the building, but did not inform them that he was a Federal Law Enforcement Officer, nor that he had discharged his weapon. AF Tab 16. Officer Allen discovered a young male hidden in the bedroom closet. The appellant alleges that he drew his weapon during he apprehension of his male juvenile, who was identified as Eric Summers, a local youth. The juvenile was taken into custody. The appellant then left the property and proceeded back toward the office. As the juvenile was being processed he revealed to the officers that he saw the appellant and a lady walking in the house, and heard the male voice say "I hope I got the bastard." The juvenile also reported hearing a gunshot. Direct examination of Deborah Treasitti, Tape 1A. **(1)**

On his way back to the office, the appellant stopped at the Wendy's where he had discussed meeting the prospective tenant. Ms. Ellis was not present, so the appellant returned to his office. There he joined Special Agent (SA) Richard Coes, and departed

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(1) Officer Deborah Allen changed her name to Deborah Treasitti late in 2004. Direct Examination of Deborah Treasitti, Tape 1A.

with SA Coes to serve subpoenas in Pine Bluff, Arkansas. The appellant received a telephone call from Officer Allen as he was driving to Pine Bluff with Special Agent Coes. AF Tab 15.

During this phone conversation, Officer Allen provided the appellant with an opportunity to amend his statement without specific prompting. The appellant asked the officer to ask a specific question. Officer Allen asked the appellant if he had fired his weapon in the apartment prior to the arrival to the police. The appellant responded in the affirmative. Officer Allen instructed the appellant to return to the NAC to discuss the incident further. SA Coes dropped the appellant off at his personal vehicle and proceeded to Pine Bluff to serve subpoenas. The appellant returned to the NAC, and was informed that he would need to make a statement to the LRPD at their detective division. The appellant returned to his place of work to draft a statement to submit to the detectives. At Around 4:15 p.m. that day, the appellant informed Resident Agent in Charge (RAC) Jeff Brzozowski that he had something to tell him. As the appellant was walking to his car, he informed RAC Brzozowski that he had discharged the firearm. Id. At the hearing, the appellant testified that he was walking to his car to deliver his statement to LRPD detectives. The appellant also testified at the hearing that his purpose in informing the RAC was to explain the disruption in his schedule, as he had not gone to Pine Bluff to serve subpoenas with SA Coes as scheduled. RAC Brzozowski informed the appellant that such a discharge must be reported. The appellant disagreed, and RAC Brzozowski brought him back to his office to review the regulations and standing orders regarding the accidental discharge of a firearm. Cross-examination of Marvin Love, Tape 3A.

Subsequently, the discharge was reported up the chain of command to Assistant Special Agent in Charge (SAC) Robert Browning in New Orleans and a Significant Activity Report (SAR) was drafted, along with a memorandum, which also served as the narrative portion of the SAR. The purpose of the SAR was to explain the discharge of the fireman and the memorandum was limited to discussion of that event. The memorandum was sent the following morning, and was dated February 12, 2004. AF Tab 16.

The Agency's Office of Inspection conducted an investigation in response to the SAR, during which they investigated the entirety of the appellant's actions on that day. On February 19, 2004, the appellant was interviewed by the Office of Inspection. Based on this interview and their other findings, the Office of Inspection issued a report of Investigation (ROI) on April 21, 2004. On September 1, 2004, the Professional Review Board proposed the appellant's removal for four reasons: (1) Inappropriate Handing of your ATF-Issued Firearm; (2) Failure to Report the Discharge of your ATF-Issued Firearm; (3) Willful Use of Government Furnished Automobile (GFA) for Other Than Official Purposes; and (4) Lack of Candor. The appellant presented a written reply to Bureau Deciding Official (BDO) Kenneth Massey on October 28, 2004 and an oral reply on October 29, 2004. BDO Massey, in his final decision, overturned reason 1, sustaining reasons 2, 3, and 4. Reasons 2, 3, and 4 were considered as factors in the appellant's removal. AF Tab 15.

Applicable Law

The appellant was charged with Failure to Report the Discharge of an ATF-Issued Firearm, Willful Use of a GFA for Other than Official purposes, and Lack of Candor.

In order to sustain an adverse action before the Board, an agency must establish, by preponderant evidence, that there is a factual basis for the conduct or condition charged and that the disciplinary action, based on proven facts, promotes the efficiency of service. See 5 U.S.C. Secs. 7513(a) and 7701(c) (1) (B). The "efficiency of the service" requirement includes a showing that some action is warranted (the "nexus" requirement) and that the particular penalty invoked is within the limits of reasonableness. Thus three distinct elements must be proven in any adverse action. *Douglass v. Veterans Administration,* 5 M.S.P.R. 280, 302-3, 306 n. 67, 307-308 (1981).

ATF Officers are required to report the inadvertent discharge of their firearm under AFT Order 8200.3, Subchapter A, subject to certain conditions. All discharges must be immediately reported by the agent involved in the discharge to his supervisor. This requirement speaks for itself and applies to all discharges, whether intentional or not. Furthermore, unintentional discharges must be reported to local authorities "for public safety reasons, if appropriate." ATF O 8200.3A(2)(a). The requirement to report an unintentional discharge to local officials for public safety reasons extends the duty to report a discharge to local police beyond those discharges which involve "property damage, injury, and death," which under the regulations create a separate duty to report. Id. At the very least, the obligation to report an unintentional discharge to local authorities extends to situations where the discharge has or had a possibility of causing injury to people in the vicinity of the incident. AF Tab15, Exhibit 4.

ATF employees who are given use of a government furnished automobile (GFA) are subject to ATF Order 2130.1(8), which established guidelines for conduct and use of a GFA. The use of a GFA is generally restricted to official use.

However, it is permitted to make a minor personal use of a vehicle, where such use falls within the guidelines established in ATF Order 2130.1(8)(b). The minor personal use exception requires the use to be incidental to other official travel, and not more than 15 minutes in duration. The rules governing use of a GFA also restrict how far from the office an agent may travel in a GFA for meals.

Lack of candor is a charge that encompasses a broader range of misconduct than a falsification charge. *Ludlum v. Department of Justice,* 87 M.S.P.R. 56, 68(2000). This charge is a particular serious one for law enforcement officers, upon whose candor rests the public safety and well-being. The agency, in its Notice of Proposed removal, refers to 31 C.F.R., Department of the Treasury Subpart B, Section 0.238 to describe lack of candor. The regulation indicates that "Employees shall not intentionally make false, misleading, or ambiguous statements, orally or in writing, in connection with any matter of official interest." 31 C.F.R. Sec. 0.238. To demonstrate lack of candor, the agency would have to show that the appellant made misleading, false or ambiguous statements.

Discussion

The agency proved two of its charges.

The agency's deciding official relied on three reasons in making his final decision to remove the appellant. Two were proven.

The first reason, Failure to Report the Discharge of an ATF-Issued Firearm, was presented with two specifications: (1) that the appellant failed to report the accidental discharge of his firearm to the local police when they responded to his call; (2) that the appellant waited four hours to report the incident to RAC Brzozowski, his supervisor. Notice of Proposed Removal, AF Tab 7-4f.

The appellant argues that under the reporting guidelines, he was under no obligation to report his discharge of the firearm to the local authorities. Asserting that he was able to track the path of the bullet, he argues that the bullet landed in the soil outside the window of the residence and that there was no damage to person or property, and implicitly, no risk to public safety. However, in his testimony and demonstration at the hearing, it was evident that he was looking behind him, away from his weapon, when he discharged it. From the demonstration in the hearing, it was also evident that while the appellant was looking backward and towards the right, the aim of his gun shifted towards the left, away from what he would have been able to perceive as the target while looking forward. Direct examination of Marvin Love, Tape 2B. Since the appellant was looking behind him, he was unable to see the bullets path as the gun was fired. By allowing his aim to shift as he looked behind him, the appellant rendered himself unable to be able to predict the likely path of the bullet with specificity. Although the appellant claimed to have fired out the window and to have identified an area on the trunk of a tree outside the residence which appears to have been grazed by a bullet, the bullet itself was never recovered. Furthermore, after contacting the local police to inform them that he suspected an intruder inside the apartment, the appellant revealed neither that he was a law enforcement officer, nor that he had discharged his firearm. AF Tab 7-4e. In fact, the appellant did not mention the discharge of his firearm or identify himself as a law enforcement officer until Officer Deborah Allen contacted him to ask specifically whether shots had been fired in the apartment.

The appellant testified that during the search of the apartment that led to the apprehension of the juvenile, Eric Summers, he drew his service weapon in response to noises heard in the apartment.

The appellant apparently assumed that the officer's failure to comment on the weapon was due to her having prior knowledge of his status as a law enforcement officer. Officer Allen denies having seen the appellant draw a weapon. Direct examination of Deborah Treasitti, Tape 1A. I find, based on these facts, that there was a sufficient public safety reason to require the appellant to inform the local police as to the accidental discharge of his firearm at the time he contacted them. Therefore the first specification of the charge is sustained.

The regulation requiring ATF agents to report the discharge, accidental or intentional, or their firearm to their commander specifically indicates that such a report should be made immediately. The record indicates that the discharge occurred around 12:30 p.m., and that the appellant reported the discharge to his commander at 4:15 p.m. The appellant testified at the hearing that he reported the incident to explain to his commander how his duties for that day had been disrupted due to the local police investigation. It was only after his commander indicated that the appellant was required to report the discharge that the appellant began the formal reporting procedure. The appellant testified that his failure to report the discharge to local authorities was a deliberate decision, based on his analysis of the reporting requirements. AF Tab 16; Direct examination of Marvin Love, Tape 2B. The appellant is a certified Firearm Instruction Coordinator with the ATF. According to testimony presented at trial, the duty to report the discharge of a firearm is a basic lesson that is repeated frequently for emphasis during firearms training. That the appellant, as an instructor, was not thoroughly familiar with the full requirements for reporting discharges is simply not credible. I find that the second specification of the charge of Failure to Report the Discharge of an AFT-Issued Firearm is sustained.

The second reason cited in the appellant's removal is Willful Use of a Government Furnished Automobile for Other than Official Purposes. The specification indicates that the appellant used his GFA on "numerous occasion" to check on his rental properties, including the stop on February 11, 2004. The appellant argues that his stop was within the confines of the minor personal use exception, and therefore permitted under the regulations. The appellant alleges that he stopped at the apartment on his way to Ryan's restaurant, where he planned to have lunch. He argues that the purpose of the stop was to inspect the property to determine what work needed to be done to prepare the property to be shown to Ms. Ellis, the prospective tenant. The agency argues that the appellant had arranged to meet Ms. Ellis during the lunch period and had gone to the apartment for the purpose of showing her the apartment. It was acknowledged that the restaurant where he planned to lunch, while distant from the office, was within the range permitted by local practice. **(2)**

The agency bases its argument on testimony that the appellant had a phone conversation on the morning of February 11, in which he discussed meeting with Ms. Ellis around noon. The appellant argues that this meeting was tentative and that he was expecting confirmation of the meeting by phone later in the day. This, however, does not seem credible. The appellant testified that Ms. Ellis would be free after her class ended at noon. There was no time present between when the tenant was going to be available and when the appellant left to allow for a phone call in advance of their meeting, and the appellant had an obligation to serve subpoenas with SA Coes after lunch. Furthermore, Ms. Ellis arrived at the location between 12:30 p.m. and 1:00 p.m. to be shown the property. Therefore the trip was not a minor stop incidental to the official duties of the appellant.

Showing the property to a prospective tenant would take considerably longer than merely inspecting it for repairs and would require more than brief deviation from the appellant's route. It could also reasonably be anticipated to last more than 15 minutes, particularly if the prospective tenant were late in arriving. The agency also alleges that the appellant made multiple stops at the property in his GFA prior to February 11, relying on testimony from the investigation that identified the GFA as being at the property on several prior occasions. However, the agency relied on the February 11, 2004 visit to establish its case for misuse of a Government vehicle, and this is the only incident addressed by both parties. It is also noteworthy that the appellant has been reprimanded for improper use of a GFA and lack of candor in 1992. AF Tab 7-4e. From his experience with this prior offense, the appellant should have had a very clear understanding of his responsibilities and obligations under the rules. Based on the stop on February 11, I sustain the single specification and the reason of Willful Use of a Government Furnished Automobile for Other than Official Purposes.

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(2) It should be noted that the regulations governing how far from the office agents may travel for lunch were loosely enforced at the Little Rock Field Office. Cross-examination of Jeff Brzozowski, Tape 1B.

The final reason presented for the decision to remove the appellant is Lack of Candor. This reason was specified as the appellant's provision of conflicting and misleading information in the appellant's statement and interview. The agency alleges that the appellant's written statement given on February 12, 2004, conflicts with that given on February 19th to the Office of Inspection. The Notice of Proposed Removal states:

In your statement dated February 12, 2004, you indicated that on February 11, 2004, you left the office at noon going to lunch at Ryan's restaurant on Baseline Street. You stated that while in southwest Little Rock, you stopped by your vacant rental property at 6 Old Glory Court to inspect and prepare it for showing to a potential tenant. You stated that after the police searched the apartment and arrested the intruder, you "...then left the area and proceeded back to the office to meet with AS [sic] Coes to serve subpoenas in Pine Bluff, Arkansas."

However, in your affidavit, dated February 19, 2004, you stated that you received a phone call from a prospective tenant and agreed to meet her at noon to show the rental property. You stated "I left the office at around to go to lunch at Ryan's restaurant on Baseline. I stopped by a vacant rental unit that I own, #6 Old Glory." You started that after the incident, while you were waiting for the police, the potential tenant came to view the apartment. You stated "I showed Cynthia the apartment for approximately 5 minutes and she left. I was to meet Cynthia at Wendy's restaurant two blocks from the office at 1:00 to supply her with a rental application." After the police arrested the intruder you stated you left the area heading back to the office to meet SA Coes, but "...stopped in Wendy's and did not see Cynthia and proceeded back to the office."
AF Tab 7-4e.

The appellant argues that his statement on February 11, 2004, was provided in response to SAC Brzozowski's advice to file a SAR and submit a memo explaining the incident. The scope of this statement was limited to the discharge of his firearm. The later interview with the Office of Inspection covered a broader scope, encompassing the full events of the day, including the alleged misuse of a government owned vehicle. In light of the difference of the scope of the inquiry leading to the statements, I find that there is no material difference between the statements that would support a finding of lack of candor.

Additionally, the agency asserts that the response which the appellant gave to Officer Allen regarding his use of the firearm were evasive and therefore demonstrative of lack of candor under the agency guidelines. The record is clear, however, that the appellant never denied firing the weapon, and when asked directly if he had, he unequivocally admitted to the discharge. His behavior in this regard does not rise to the level of establishing a lack of candor, under agency guidelines. Because none of the appellant's statements and actions upon which the agency relies in making its lack of candor claim demonstrate a lack of candor, this specification in not proven, and this reason is not sustained.

Disciplinary action will promote the efficiency of the service.

The nexus requirement, for purposes of determining whether an agency has shown that its action promotes the efficiency of service, means there must be a clear and direct relationship between the articulated grounds for an adverse action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest. *Merritt v. Department of Justice*, 6 M.S.P.R. 585, 596 (1981), *Modified, Kruger v. Department of Justice*, 32 M.S.P.R. 71, 75 n.2 (1987)

An agency may show a nexus between off-duty misconduct and the efficiency of the service by three means: (1) a rebuttable presumption in certain egregious circumstances; (2) preponderant evidence that the misconduct adversely affects the appellant's or co-workers' job performance or the agency's trust and confidence in the appellant's job performance; or (3) preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. *Kruger v. Department of Justice*, 32 M.S.P.R. 71, 74 (1987). Here the appellant's repeated misuse of a GFA and his failure to abide by agency regulations clearly affected the agency's confidence in him.

The Penalty is reasonable.

Based on three reasons discussed above, the Bureau Deciding Official approved the proposed removal of the appellant. Law enforcement officers are held to a higher standard of conduct with respect to the conduct expected of them and the severity of the penalty invoked for failure to meet those expectations. *Todd v. Department of Justice*, 71 M.S.P.R. 326, 330 (1996). Where the agency's charges are sustained, the Board will review the agency's penalty selection only to determine if the agency considered all the relevant factors and exercised management discretion within the tolerable limits of reasonableness. *Hylick v. Department of the Air Force*, 85, M.S.P.R. 145 (2000); *Douglass v. Veterans Administration*, 5 M.S.P.R. at 306. BDO Massey considered several factors in making his removal decision. BDO noted the seriousness of the offences, which "raise[d] concerns about your ability to adhere to the standards set by the Bureau for a special agent." AF Tab 7-4a. In the hearing he explained that in smaller ATF offices, like the one in Little Rock, individual agents hold much more responsibility and have a higher individual degree of contact with the community and local law enforcement.

Direct Examination of Kenneth Massey, Tape 2A. Furthermore, he commented that the appellant held a position of "public trust in which [he] is closely scrutinized and [his] honestly and integrity must be unquestioned." AF Tab 7-4a. He noted that the penalty for the 1992 infractions was reduced from removal to a 50 day suspension. He also noted that these previous offenses should have provided the appellant with a clear understanding of the regulations. When looking at the past work record of the appellant, BDO Massey noted that while the appellant had been an employee of the ATF for 16 years, his service record was consistently average. BDO Massey opined that it was unusual for an agent with the amount of experience the appellant had to have performed so unexceptionally. Direct examination of Kenneth Massey, Tape 2A. Nevertheless, Massey found that the appellant is able to perform the duties of his position, but that the charges, if sustained, would substantially impair the trust and confidence that the ATF had in the appellant, his abilities, and his judgment. The BDO also testified that the penalty of removal, especially in cases dealing with misuse of a GFA and lack of candor, is consistent with other penalties assessed. Id. He also noted that ATF does not use a table of penalties and was not, to his knowledge, planning on adopting such a table. BDO Massey did find that notoriety was not likely to be substantial factor in the penalty. The case involved a small number of people, and had received no media attention. However he still felt that the image of the ATF held by local law enforcement could be endangered by the behavior of the appellant. Id. He also explained that all ATF employees are provided with notification of the regulations governing their conduct when they are employed, and are notified that they are responsible for reading them.

Furthermore, the appellant was a trained Firearms Instructor, and had previously dealt with charges dealing with Lack of Candor and Misuse of a GFA, and so should have specific knowledge of the regulations governing each of these. When questioned about the potential for the rehabilitation of the appellant, BDO Massey noted that the appellant was previously given the opportunity for rehabilitation, but instead essentially repeated his offense. BDO Massey found that no mitigating factors applied in this case. Id. BDO Massey also determined that demotion or other alternative measures would not deter further misconduct, in light of the existence of previous offenses. Cross Examination of Kenneth Massey, Tape 2A.

Of the three reasons for removal upheld by BDO Massey, I have sustained two: Failure to Report the Discharge of and ATF-Issued Firearm and Willful Use of a GFA for Other than Official Purposes. Both of these charges are serious, especially as it is the second offense for the willful misuse of a GFA. Misuse of a government vehicle abuses a privilege granted by the government as an employer in order to promote the efficiency of the service. Misuse of that privilege opens the government to liability and wastes taxpayer money. This charge is so serious that Congress has instituted a statutory minimum penalty for those who transgress the regulations on the use of such vehicles. For someone who has already been disciplined for such an offense to repeat the offense undermines the efficiency of the service. Furthermore, law enforcement officers are armed with deadly weapons for the protection of themselves and the citizenry at large. The failure of an officer, especially one who trains others in the use of these weapons, to know and follow the protocol and regulations for their use is inexcusable. Such a failure places the agency, fellow officers, and the public at large at risk.

The Board has held that loss of trust is a significant factor in selecting discipline. *See, e.g., Sanders v. Department of Justice,* 65 M.SP.R. 595, 602 (1994), *aff'd* 73 F.3d 380 (Fed. Cir. 1995) (Table). When the Board sustains fewer than all of the agency's charges, the Board may mitigate the agency's penalty to the maximum reasonable penalty so long as the agency has not indicated in either its final decision or in the proceeding before the Board that it desires that a lesser penalty be imposed on fewer charges. Lachance v. Devall, 178 F.3d 1246, 1260 (Fed. Cir. 1999). In light of these facts, the agency decision to remove the appellant is affirmed.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: "s/ Sidney E. Farcy,
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARVIN LOVE, DOCKET NUMBER

Appellant, DA-0752-05-0205-I-1

v.

DEPARTMENT OF JUSTICE, DATE: October 3, 2005

Agency.

Denis P. McAllister, Esquire, Garden City, New York, for the appellant.

Jill A. Weisman, Esquire, Washington, D.C., for the agency.

Keith L. Williams, Esquire, Washington, D.C., for the agency.

BEFORE

Neil A.G. McPhie, Chairman; Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115(C.F.R. sec. 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. Sec. 1201.115(d). Therefore, we deny the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. Sec.1201.113

NOTICE TO THE APPELLANT REGARDING YOUR FUTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals For the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no late than 60 days after receipt by your representative. If you choose to file, be careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management,* 931 F 2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. Sec. 7703). You man read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.htme. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD: "s/ Bentley M. Roberts, Jr."
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this Order was sent today to each of the following:

Certified Mail	Denis P. McAllister, Esq. 350 Old Country Road, Suite 101 Garden City, NY 11530
Certified Mail	Marvin Love 7 Pickayune Court Little Rock, AR 72211
Certified Mail	Jill A. Weissman, Esq. Bureau of Alcohol, Tobacco, Firearms, And Explosives Department of Justice Bureau of Alcohol, Tobacco & Firearms Office of Chief Counsel 650 Massachusetts Avenue NW., Room 6100 Washington, DC 20226
Certified Mail	Keith L. Williams, Esq. Bureau of Alcohol, Tobacco, Firearms, And Explosives Office of Chief Counsel 650 Massachusetts Avenue NW Suite 6100 Washington, DC 20226

October 3, 2005 "s/ Ameeran Ali"
(Date) Paralegal Specialist